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Forum Juridicum: "Manifest Error" - Further observations on appellate review of facts in Louisiana civil cases

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Further observations on appellate review of facts in Louisiana civil cases

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It is with some diffidence that I express views which vary from those recently stated by a very distinguished and brilliant appellate judge.[1] I do believe, however, that the decades have not diminished the necessity for firm adherence to the principle of appellate review of facts followed in Louisiana since our earliest days as a state, that a trial court's factual determinations should not be disturbed upon review in the absence of "manifest error."[2]

In my opinion, the basis for this rule is more fundamental than the better ability of the trial judge to evaluate the credibility of the witnesses, although this is indeed still a valid reason for the rule. The principle of attaching great weight to the determinations of the trial court should, I think, be regarded as rooted in the essential nature of appellate review, with its limited function within the administration of justice by our entire court system.

The basic reason why a judicial system provides for appellate review, we can all probably agree, is to assure the fair and uniform application of law throughout the jurisdiction. As I see it, an appellate court accomplishes this fundamental purpose in two ways: (1) by determining whether the correct general rule or principle of law has been applied by the trial court in deciding the case; and (2) by determining whether individual justice has resulted from the correct application of such general rule to the particular facts before the court.

As to the first standard, there is no disagreement that the appellate court should reverse when the trial court has reached

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1. Hardy, *The Manifest Error Rule*, 21 LOUISIANA LAW REVIEW 749 (1961).

2. Comment, *Appellate Review of Facts in Louisiana Civil Cases*, 21 LOUISIANA LAW REVIEW 402 (1961).

a wrong result by applying the wrong general principle. The appellate court does so not only to assure individual justice in the case then before it, but also in order to provide as clearly as possible the general legal rule to be applied to similar factual situations arising in the future. Insofar as the legal principle can be clearly stated, with the precluding of any ruling by way of dicta on the variations or exceptions reasonably implied from the purpose of the rule, the appellate court can thus aid potential litigants in the future to settle their disputes without the intervenion of the courts, and can thus assist trial courts to determine cases before them in the future without the necessity in many instances for a re-examination of the dispute by an appellate court, once the trial court has resolved the contested facts (following which the application of the general rule clearly indicates the result).

As to the second standard of appellate review stated above, appellate judges do have differing views among themselves as to the proper weight to attach to trial court determinations of the facts which call into play the application of the general rule.

While we all give lip-service to the principle that the trial court's factual determinations should be accepted upon appeal in the absence of manifest error, some appellate judges feel that the trial court's result is manifestly erroneous whenever they themselves upon the same record believe that a different result is warranted. Although some of these judges so believing are among our most distinguished and able, I must nevertheless respectfully differ from this concept of the function of an appellate judge.

Under the Louisiana Constitution, of course, in most civil cases appellate review is upon both the law and the facts.[3] But, I respectfully suggest, this does not imply the free substitution of the appellate court's judgment for that of the trial court, without affording any weight whatsoever to the trial court's determinations.

The very circumstance that the Constitution provides for a judicial system composed of many trial judges and of only four intermediate appellate courts surely indicates that the latter were not intended to duplicate the work of the former, if only because neither time nor personnel will permit. The efficient use

3. LA. CONST., Art. VII, §§ 10, 29.

of judicial personnel, as well as of the efforts of those busy officers of the court, the attorneys, dictates that different functions be allotted to the trial and to the appellate courts: that, as to factual matters, to the former tribunals are entrusted primarily their trial and determination, while to the latter is delegated primarily the *review* of such determinations by the trial court — not an independent redetermination in which the trial court finding is assigned no weight. The trial court has a responsible independent function in the adjudication of controversies; its function for purposes of the appeal is not to serve only as a sort of glorified court reporter to make up a record for the appellate tribunal.

The structure of our court system indicates to me an intention that most cases should be decided at the trial level by the local judge, familiar with the nature of the people before him, as well as with community concepts of fairness; by a judge through whose court daily passes the stream of human life, represented by living, breathing human beings faced with the problems of existence which force them into judicial proceedings; by a judge whose perception of other human beings and of what human nature regards as fairness is constantly sharpened by daily experience. In contrast, by its very nature, the appellate tribunal is a "library" court, its primary studies directed not so much towards human nature (although of course this is a part of its work), but more, rather, towards statutes and judicial interpretations and abstract principles and general rules.

By creating a system of many trial and of few appellate tribunals, the makers of our Constitution thus did not in my opinion intend that finality of most adjudications should be accorded only after *both* the trial and the appellate courts had independently determined the facts to which the general legal principle is to be applied; but, rather, that the appellate court's intervention be restricted chiefly to those instances where the trial result is inconsistent with general law or is reached by a too-individualized or an arbitrary appreciation of the facts.

Our jurisprudence recognizes, in fact, that a trial court judgment represents a vested property right, its execution only suspended by a suspensive appeal; that the appeal has for its purpose the determination of whether the trial court committed error on the basis of the record made up before it; and that thus the trial court's determination is not merely, so to speak, an

interlocutory order awaiting the action of the appellate court to give it validity.[4]

Because, then, there must be some degree of finality to factual determinations by the trial court, as well as because of its better practical ability to make them, our Supreme Court has stated that "an appellate court will not reverse the judgment of the trial court, if the evidence of the successful party, when considered by itself, is sufficient to sustain the judgment."[5]

In my opinion, this rule of review requires not only that the appellate court accept the trial court's determinations as to which witnesses are more credible. It also requires that the appellate court will not disturb the trial court's express or implied factual findings if the evidence is reasonably open to any interpretation in accord therewith. By this, I mean that there is a presumption on appeal that the trial court's judgment is correct,[6] from which it follows that on appeal a reviewing court should not reverse an adjudication by the trier of fact if such result is justified by according to the evidence any weight or meaning or shading thereof which the trial court may reasonably have accorded to it; that the ambiguities in a record which often result from oversight during the heat of trial, and sometimes also perhaps from the astute desire of counsel not to develop aspects unfavorable to their cause, should be construed in favor of the correctness of the trial court; in short, that an appellate court must not reverse a factual decision of the trial court in the absence of manifest error.

On the other hand, I do not mean that appellate review is restricted to questions of law and that an appellate tribunal is required to rubberstamp with approval any and all factual determinations by the trial court. In accordance with his constitutional duty to review the facts, an appellate judge must recommend reversal when in his opinion the factual evidence cannot reasonably be construed to support the trial result. However, before so concluding, the appellate judge should, in my opinion, rule out every reasonable construction of the evidence which supports the trial determination; reversal should not be recommended simply because the appellate judge might have himself de-

4. Castelluccio v. Cloverland Dairy Products Co., 165 La. 606, 115 So. 796 (1928); Dark v. Brinkman, 136 So. 2d 463 (La. App. 3d Cir. 1962).

5. Rhodes v. Sinclair Refining Co., 195 La. 842, 197 So. 575, 576 (1940).

6. See, e.g., Dupuy v. Iowa Mutual Ins. Co., 113 So.2d 830 (La. App. 1st Cir. 1959).

cided the case differently by construing the evidence differently than did the trial court.

Let me say this, however, before proceeding further, lest I give the impression that there is more uncertainty or guesswork in judicial determinations than there is. In perhaps well over ninety percent of litigation most trial and appellate judges will reach the same general result based upon the evidence in the record. In many reversals, most appellate judges will agree the error is manifest. As to such cases, obviously, it makes little difference whether the standard of appellate review affords little or much weight to the trial court's findings of facts.

But there is a substantial minor percentage of cases in which different judges may reasonably reach different conclusions based upon the same appellate record. If this is not self-evident, then consider the appreciable number of reversals of trial court determinations upon appeal, perhaps one in ten, as well as the circumstance that in perhaps one of twenty appellate decisions one appellate judge dissents from the result reached by his brothers of the majority.[7]

It is in "borderline" cases, where different judges may reasonably reach different results, that the amount of weight given to trial court factual findings on appellate review may determine whether the trial result is affirmed or reversed or modified. Included in these borderline cases are determinations which, actually, *no* court can make with certainty that a given result is the *only* one fair and proper under the record.

For instance, under appellate records which seems to present very similar facts (but also taking into consideration the almost infinite variations of personalities, estimates of time and distances and amounts, by witnesses of differing ability to estimate same, the differing abilities of witnesses to describe in words

7. The estimates in this paragraph are based upon a cursory count of reversals and dissents in the decisions of the Third Circuit Court of Appeal during the 1960-61 court year and of the First Circuit during the period of my service thereon from 1954-1960. Thus, of the 279 appeals decided by the Third Circuit in the year in question, there were 60 reversals in whole or in part; although over half of them could probably be considered as reversals based on law rather than on a different appreciation of the facts by the appellate court.

In considering these differences among the judges as to the correct disposition, it is to be remembered that we are considering such differences as arise from the disposition of *appeals* only, which generally involve the closer cases. There are a far greater number of trial court adjudications not appealed, most of them presumably because, after all the evidence was in and the trial court decided, the loser felt there was sufficient certainty as to the correctness of the result as not to warrant the further expense of an appeal.

the identical facts, the differing ability of witnesses to understand and to observe accurately and to remember later accurately circumstances to which they may have been inattentive at the time or which may have occurred in a few seconds of sudden crisis, etc.) :

Who can really say, when four witnesses describe an occurrence one way and four give a contrary account with seemingly equal truthfulness (or, for that matter, when four witnesses describe an accident one way, and *one* witness describes it another), which version is really the correct one — when perhaps all the witnesses are equally sincere, some accounts based however upon a mistaken recollection or interpretation of long-ago facts?

Who can say, when conflicting estimates of seconds and feet are later made based upon a few confused split-seconds of misjudgment and crisis, and when the rights and duties of the parties may have depended upon the number of feet or seconds, and when the physical facts support either version (themselves in evidence only through the testimony of human witnesses with the usual human exemption from infallible accuracy in measurement and memory) — who can say then which estimates of time or distance are indeed correct?

Who can really say whether under certain closely similar facts a husband should reasonably pay $30.00 per week alimony rather than $25.00 or $35.00?

Who can really say whether a temporary lumbosacral back sprain is worth $1500 or $2250, based upon the same record, when of necessity the award for pain and suffering is somewhat arbitrary in nature, and when the amount of pain and suffering must vary from individual to individual, and when the award must as always be based upon the differing weight to be given to the always conflicting medical and lay testimony?

Who can really say, absolutely and without any question whatsoever, in certain borderline situations, that a motorist preempted an intersection by entering it at such a distance ahead of the right of way motorist as to have been able reasonably to assume he could complete his crossing without obstructing the passage of right of way traffic, when there is substantial conflict in the evidence, and when the determination must depend

upon the varying and uncertain observations and recollections of conflicting witnesses?

In instances such as these, where under the same record different judges may reasonably reach different results by reasonably allowing different weight to varying components of the evidence, the appellate court, in my opinion, must not disturb the factual determination of the trial court, even though an appellate judge feels that he might have reached a different conclusion had he himself tried the case.

For we must realize that in borderline situations such as we have described, justice is not a matter of mathematical exactitude and that, absent the omniscience of the Creator (Who alone knows which witnesses truly observed and remembered and which truly testified), the same transcript of evidence may equally well justify two opposing results — *each* a fair solution of the controversy, depending upon the evaluation to be given to the differing witnesses and to the imprecise factual data.

The concept that in borderline instances virtually identical facts may produce different judicial results should not shock us. We know, for instance, that under virtually identical borderline facts, one jury may convict, and another jury may acquit. We know that conviction for the same offense of drunken driving may in one parish automatically provoke a mandatory jail sentence, whereas in the neighboring judicial district it merely merits a heavy fine, or perhaps in yet another judicial district it may result in a suspended sentence, although in all three instances it is a first offense of a similarly-situated accused.

We there recognize that, although ideal justice might well suppose that similar acts deserve identical judicial results, nevertheless there are so many intangible individualizations surrounding each human being and each set of circumstances in which he is involved, as well as each different local community, as to make precisely identical treatment by different courts of every similar situation a virtual impossibility, administered as our judicial system must be, as are all other agencies of human society, by fallible and differing human beings, however conscientious and sincere.

Thus, the primary purpose of any judicial system may be said to be to attain justice. If a greater power of review serves that aim, it must be permitted, even though it may involve more

expense and delay. But, although all judges may agree that justice is the primary aim of their work and may conscientiously strive for the just result, we have likewise recognized that in borderline situations each judge's concept of what is the just result may reasonably to some degree differ.

In such instances, where the result reached is reasonably within a discretionary range of factual interpretation by the trial court, the appellate judge must in my opinion defer to the trial court's conception of the just result, though it differ from his own. By doing so, he recognizes that the judicial system serves the public interest better by assuring a greater stability of judicial determinations than ensues when appellate judges generally assume a greater power of review by substituting their own no less fallible judgment for the trial court's when there is a reasonable basis for the latter.

For, if no weight at all is given to the trial court's finding, then we might as well dispense with the trial below as an empty and time-wasting ceremonial. When two judicial answers are equally reasonable, not only the efficient and economical use of judicial and legal manpower demand some sort of finality to the trial court's determination, but also the requirement of the general citizenry that a legal system, to be satisfying and to serve the purposes of society, provide a method of adjudications as certain and stable as is possible, which moreover seem to proceed, not from the variable personalities of the different human judges, but rather from the impersonal majesty of the law.

By following the general policy of allowing some sort of finality to the trial court's factual determinations in borderline cases, except where manifestly erroneous; by allowing the trial court to perform its function of determining facts and by disturbing such determinations on appeal only if manifestly erroneous or arbitrary; by restricting the function of the appeal to its proper sphere of reviewing, not independently re-trying, the facts heard before the lower court: we have provided a judicial system which indeed assures every litigant a fair trial and the uniform application of general rules to him, but a system which likewise, because of the relative finality of factual determinations by the trial court and the consequently fewer appeals, affords a more expeditious and less expensive method of adjudicating disputes than one which permits the independent re-deter-

mination of factual variable by appellate judges who assign no weight to the trial court's findings.

I have not mentioned yet the far better ability of the trial court to evaluate the credibility of the witnesses, upon which evaluations many factual determinations rest. But this is a sound reason in itself to afford great weight to trial court findings of fact, based as they must be to some extent upon its relative evaluation of the witnesses.

Even though we are more urbanized then in former days, so that a judge is not as likely to know personally each of the witnesses or his background, it seems to me that we should not underrate the ability of an experienced and perceptive person to estimate the sincerity and reliability of another human being, based only upon a face to face confrontation and without any prior acquaintance or knowledge of background.

Undoubtedly, in an appreciable number of cases, trial courts may be fooled by a consummate actor, or perhaps they may sometimes give insufficient weight to testimony because of a witness' faltering manner. (On the other hand, we all have also had the trial experience where the testimony of a glib and obviously untruthful witness reads straight and clear in the typed record, when we cannot evaluate such testimony in the light of the individual's mannerisms and apparently false personality; or where the testimony of the extremely conscientious witness, who hesitates and clarifies because of what in open court is his obvious honesty and a sincere effort to testify to exactly what he knows and only that, sometimes seems in the cold appellate record to be evasive and indecisive.)

Nevertheless, the face and talk and appearance of many persons, and probably of most people, is a fairly accurate approximate guide to their personality and character. For instance, businessmen on a day to day basis must often judge by such means the sincerity and reliability of salesmen or of potential customers, and must back their judgment with their money. And, although undoubtedly they are sometimes fooled, yet I venture to state that this is not too often the case and that their inarticulated evaluation of the total character of the individuals dealing with them will in most instances fairly accurately weed out the confidence man from the reliable citizen. Indeed, in ordinary life all of us must rely to some extent upon the apparent person-

ality and character of some of those we casually meet, even though once, and it seems to me that such evaluations are very often made, as fuller acquaintance may prove, with a fair degree of accuracy.

To repeat, I do not mean that one can infallibly judge a person's reliability and propensities by his appearance and conversation. But we can do so in such a great number of instances as to lead me to think that we should not discount a trial court's evaluation of the credibility of witnesses simply because he sees them only once, upon the occasion of their testifying under oath at the trial.

The trial judge, it must be remembered, does not usually attain his position without a reasonable amount of understanding of human nature based upon his own experience and his perceptiveness as an individual; his judgment of a person's reliability ordinarily is founded upon much more experience and training than is the judgment of lay persons, which latter in itself is not, as suggested, to be discounted as worthless. The trial court is further able himself to ask questions in the event of doubt and to evaluate the witness' responses, should any question of accuracy or truthfulness of the witness arise in his own mind.

And, at any rate, to whatever degree (and it must be some) the trial judge's seeing and hearing the witness testify in person assists him in evaluating the witness' truthfulness and accuracy, he is in a better position to do so than is the appellate court, which has only the cold record to go by and which does not see and hear the witness even this once.

In summary, then, I believe that appellate courts must adhere to the settled jurisprudential rule to which at least lip-service has been paid by a century and a half of Louisiana precedents: that a trial court's factual determinations should be accepted on appellate review, in the absence of manifest error. And we must do so not only because as a practical matter the trial judge is in a better position than is his appellate brethren to evaluate the credibility of witnesses. We must do so also because the proper and efficient operation of our judicial system allots factual determinations primarily to the trial judge and only secondarily to the appellate court, and because the public interest in the swift and authoritative settlement of disputes at law requires it.